86-1160

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
OCTOBER TERM, 1986

SHEARSON LEHMAN BROTHERS INC.,
JOSEPH F. BODKIN, & NICHOLAS BUSTAMANTE,
Petitioners,

v.

MAYAJA, INC., S.A. ORART,
ELIAS SHEINBERG & MARCIA SHEINBERG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are federal district courts barred from enforcing agreements to arbitrate a claim arising out of a contractual relationship if the claim is based upon an implied right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a?

RULE 28.1 LIST

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Inc.

Active Subsidiaries

Boston Hambro Corp.
Boulevard Investors Inc.
Boulevard Real Estate Corp.
Burlington Investors Inc.
E. B. Realty
Lombard Realty Corporation
Lowell Investors Inc.
Lowell Real Estate Corp.
Shearson Dat-Cheong Company Limited
Shearson Lehman/Amex Finanz A.G.
Shearson/KM, Inc.
Shearson/ NGP Inc.

Inactive Subsidiaries

Genex Insurance Brokerage Ltd.
Mideast-American, Inc.

Affiliates

Banque Eurofin
Barony Company Ltd.
California S.A.
Carnegie Capital Management Company
Shearson Financial Services of Oklahoma, Inc.
Shearson Financial Services of Texas, Inc.
Shearson Lehman Brothers SARL
Intermodal Equipment Associates
KCC Syndicate Managers, Inc.
McLeod Young Weir Limited
New World Corporation
Rex Moor Properties Incorporated
Russell Energy Inc.
Sovran Energy Corp.

Non-Wholly Owned Subsidiaries and Affiliates of Shearson Lehman Brothers Holdings Inc., the parent company of Shearson Lehman Brothers Inc.*

American Express Asset Management Limited
American Express Asset Management N.V.
American Express Asset Management S.A.
American Express U.K. Holding Company Inc.
Dr. Pepper Holding Company
FGIC Corporation
Kuhn Loeb Lehman Brothers International B.V.
Lehman Borthers International UK Ltd.
Lehman International Finance N.V.
Lehman Overseas N.V.
LBKL 82-1 Investors Inc.
Shearson Lehman Broadgate North Inc.
Shearson Lehman Broadgate South Inc.
Shearson Lehman Brothers Limited
The McLeod Young Weir Corporation

*The parent company of Shearson Lehman Brothers Holdings Inc. is the Amercian Express Company.

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Section 3, 9 U.S.C. § 3

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77 l(2)
Section 14, 15 U.S.C. § 77n

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b)
Section 29(a), 15 U.S.C. § 78cc(a)

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5

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* The text of these provisions is reproduced in full at Appendix A hereto

No. _____

In The

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Petitioners,

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MAYAJA, INC., S.A. ORART,
ELIAS SHEINBERG & MARCIA SHEINBERG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Shearson Lehman Brothers Inc. ("Shearson"), Joseph F. Bodkin and Nicholas Bustamante, defendants below, respectfully pray that (a) a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on November 17, 1986, which affirmed in part an Order of the United States District Court for the Western District of Texas; and (b) upon issuance of a writ of certiorari, consideration of the Fifth Circuit judgment be withheld pending the issuance of the Court's opinion in *Shearson/American Express, Inc. v. McMahon,* No. 86-44 (1986); and (c) to the extent the issue presented here is unresolved by *McMahon,* that this Court resolve that issue in this case.

The District Court refused to enforce a pre-existing agreement between Shearson and respondents/plaintiffs, who were customers of Shearson, to arbitrate all disputes arising out of their customer-broker relationship. The District Court refused to order arbitration of plaintiffs' claims under: (1) § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, § 78j(b)("§10b") (1982) (the "Exchange Act"); and (2) § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1982) ("RICO").

On appeal, the Fifth Circuit reversed the District Court in part and ruled that district courts within its jurisdiction must enforce agreements to arbitrate RICO claims but held that they were barred from enforcing agreements to arbitrate claims arising under § 10(b). *Mayaja, Inc. v. Bodkin,* 803 F.2d 157 (5th Cir. 1986). The Fifth Circuit held that *Wilko v. Swan,* 346 U.S. 427 (1953), and its own precedents — *see, e.g., Bustamante v. Rotan Mosle, Inc.,* 802 F.2d 815 (5th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.,* 796 F.2d 59 (5th Cir. 1986), *petiton for cert. pending,* No. 86-282 (1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 785 F.2d 1274 (5th Cir. 1986); and *Sibley v. Tandy Corp.,* 543 F.2d 540 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977) — compelled its result for § 10(b) claims, noting:

> "We agree with *Bustamante* and four other circuits that, absent a clearer statement from the Court as to the arbitrability of 1934 Act claims, we must abide by the confirmed precedents of our circuit."

803 F.2d at 162 (citations omitted).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 803 F.2d 157, and is reproduced at Appendix B hereto. The opinion of the United States District Court for the Western District of Texas is reproduced at Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 17, 1986. A copy of the judgment is reproduced at Appendix D hereto. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

In 1985, respondents Mayaja and Orart, corporations owned by the Sheinberg family of Mexico City, Mexico and San Antonio, Texas, opened Corporate Commodity Accounts and Corporate Financial Management Accounts with Shearson, and respondents Sheinberg opened a Financial Management Account with Shearson. At that time, respondents signed a series of Customer Agreements with Shearson, each of which provided for arbitration of any controversy relating to the various accounts. A typical agreement provided in part:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I [the customer] may elect.

In July 1985, respondents sued Shearson and Nicholas Bustamante, Shearson's registered representative who handled their accounts, and Jospeh F. Bodkin, Shearson's branch manager, in the United States District Court for the Western District of Texas, claiming that there had been unauthorized transactions in their accounts. They alleged that defendants' conduct constituted: (a) a violation of § 10(b) of the Exchange Act and Rule 10b-5 thereunder; and (b) a violation of § 1962 of the RICO statute.

Shearson, Bustamante and Bodkin moved for an order to enforce the arbitration agreements pursuant to § 3 of the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "Arbitration Act"). The District Court, relying on Fifth Circuit precedent prior to *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213 (1985), refused to enforce the agreements to arbitrate the § 10(b) claims and the RICO claims.

Pursuant to 28 U.S.C. § 1292(a)(1), respondents appealed the District Court's order refusing to enforce the agreement to arbitrate the § 10(b) claims and RICO claims.

The Fifth Circuit ruled that district courts within its jurisdiction must enforce arbitration agreements insofar as they apply to civil RICO claims but cannot enforce arbitration agreements insofar as they apply to claims under § 10(b) of the Exchange Act.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision forbidding the enforcement of agreements to arbitrate claims under § 10(b) of the Exchange Act — like the decisions of four other circuits — *McMahon v. Shearson/American Express, Inc.,* 788 F.2d 94 (2d Cir.) *cert. granted,* 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *Jacobson v. Merrill Lynch, Pierce, Fenner &*

Smith, Inc., 797 F.2d 1197 (3d Cir. 1986), *petition for cert. pending*, No. 86-487 (1986); *Conover v. Dean Witter Reynolds Inc.*, 794 F.2d 520 (9th Cir. 1986); *Wolfe v. E.F. Hutton & Co.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*) — is in direct conflict with the decision of the Eighth Circuit in *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986), *petition for cert. pending*, No. 86-578 (1986), and the decision of the First Circuit in *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,001 (1st Cir. 1986), which decisions enforced agreements to arbitrate § 10(b) claims.

As a result of the conflict in the circuits, this Court granted certiorari in *McMahon* and will hear oral argument on that case on March 3, 1987. If the Court does not resolve the conflict in the circuits on the arbitrability of § 10(b) claims in *McMahon*, Shearson respectfully requests that the Court do so in this case.

The Fifth Circuit's decision on Section 10(b) claims conflicts with recent decisions of this Court and with the clear mandate of Congress in Arbitration Act, that all doubts are to be resolved in favor of arbitration.

Until this issue is resolved, parties to arbitration agreements will continue to be deprived of an efficient, expeditious, and less expensive alternative to federal courts for settling their disputes. Meanwhile, each passing day will clog the courts with more motions raising this issue, and with more lawsuits asserting claims that should be determined through arbitration.

I. To the Extent the Question is Not Resolved in *Shearson v. McMahon,* No. 86-44, This Court Should Grant Certiorari to Decide Whether Congress Intended to Prohibit the Enforcement of Agreements to Arbitrate Claims Arising Under § 10(b) of the Exchange Act.

The Fifth Circuit, fully aware of the Eighth Circuit's decision in *Phillips,* explicitly disagreed with *Phillips* in its opinion below. The First Circuit, deciding *Page* after the Fifth Circuit decided this case, rendered an opinion in conflict with the Fifth Circuit. The result is a direct conflict within the Circuits. This fundamental conflict between circuit courts of appeals, both reviewing the same legal arguments, should be resolved.

A. The Fifth, First and Eighth Circuit Courts of Appeals Are in Direct Conflict As to Whether the *Wilko v. Swan* Exception to the Arbitration Act for Claims Under § 12(2) of the Securities Act of 1933 Should Be Extended to Claims Under § 10(b) of the Exchange Act.

Congress did not create a private remedy for violations of § 10(b) of the Exchange Act. Instead, a judicially-implied private right of action evolved over the years. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 380 (1983). Plaintiffs in securities actions now routinely claim violations of § 10(b), usually on the basis of the same facts alleged to support a claim of common law fraud. Common law fraud claims, of course, are arbitrable even if they are based upon the same allegations as federal securities law claims. *Byrd,* 470 U.S. 213, at 216-17. Whether § 10(b) claims can be arbitrated, however, is a question that has split the district and circuit courts.

The arguments on both sides of this issue have been fully developed over the years, in decisions from this Court, from the circuit courts of appeals, and from numerous district courts. Further consideration by the lower courts will create continued conflict, not clarification.

1. The Fifth Circuit's decision in this case rests upon its own precedents extending *Wilko v. Swan* to § 10(b) claims and its own view of public policy rather than any analysis of Congressional intent.

The Fifth Circuit gave only one reason for precluding enforcement of agreements to arbitrate § 10(b) claims: prior Fifth Circuit precedent extending *Wilko v. Swan,* 346 U.S. 427 (1953) to § 10(b) claims. *Mayaja,* 803 F.2d at 162.[1]

In *Wilko,* this Court determined that the "non-waiver" provision of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* (1982) (the "1933 Act"), when coupled with the explicit and unique procedural and substantive rights granted under § 12(2) of that Act, barred enforcement of an agreement to arbitrate that explicitly-created remedy. The *Wilko* Court held that the right to select a judicial forum was a "provision" of the 1933 Act, and thus subject to § 14 of the 1933 Act, 15 U.S.C. § 77n (1982), which voids any "stipulation" waiving compliance with any "provision" of that Act. *Wilko,* 346 U.S. at 434-35.

The reasoning of *Wilko* was thus limited to the specific language of the 1933 Act, and in particular to the express

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[1] *See Bustamante v. Rotan Mosle, Inc.,* 802 F.2d 815 (5th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.,* 796 F.2d 59 (5th Cir. 1986), *petition for cert. pending,* No. 86-282 (1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 785 F.2d 1274 (5th Cir. 1986); *Sibley v. Tandy Corp.,* 543 F.2d 540 (5th Cir. 1976), *cert. denied,* 434 U.S. 824 (1977).

statutory remedy in § 12(2). As this Court has recently reconfirmed, the 1933 Act and the Exchange Act should not necessarily be construed *in pari materia*, but should be analyzed separately according to the language and purpose of each statute. *Randall v. Loftsgaarden*, ____ U.S. ____, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986).

Nevertheless, several circuit courts of appeals, prior to this Court's decision in *Byrd*, extended *Wilko* to bar arbitration of § 10(b) claims.[2] Even those courts that extended *Wilko* to § 10(b) claims did not forbid the arbitration of all securities law claims. For example, *Wilko* does not apply to disputes between members of the securities exchanges or the National Association of Securities Dealers, Inc., who are subject to rules mandating arbitration. *See, e.g., Halliburton & Assocs., Inc. v. Henderson, Few & Co.*, 774 F.2d 441, 444-45 (11th Cir. 1985); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir.), *cert. denied*, 406 U.S. 949 (1972). Nor does *Wilko* apply where arbitration is selected *after* the dispute has arisen. *See, e.g., Coenen*, 453 F.2d at 1213; *Gardner v. Shearson, Hammill & Co.*, 433 F.2d 367, 368 (5th Cir. 1970) (*per curiam*), *cert. denied*, 401 U.S. 978 (1971).

Indeed, the securities industry, in conjuction with the Securities and Exchange Commission ("SEC") and other interested parties, has developed and established procedures for arbitrating securities law claims that provide protection

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[2] *See Surman v. Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61-62 (8th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1025-26 (11th Cir. 1982); *De Lanice v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977).

to the public and to the policies underlying the securities laws.[3] Contrary to any concern that may have been expressed by the courts about the ability of arbitrators to resolve securities law claims fairly and competently, the historical evidence demonstrates that arbitration governed by these procedures effectively carries out the public policies underlying the securities laws. *See* C. Katsoris, *The Arbitration of a Public Securities Dispute,* 53 Fordham L. Rev. 279 (1984).

The SEC is the federal agency principally concerned with the administration and enforcement of the federal securities laws and regulations, including Section 10(b) and Rule 10b-5. The SEC is responsible for overseeing and regulating the activities of stock exchanges and securities associations, including the rules they prescribe for arbitration of cases such as the one at bar. The SEC's authority to do so arises from Section 19 of the Exchange Act, 15 U.S.C. § 78s. It is

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[3] Arbitration is a structured forum subject to a clear set of rules. *See, e.g.,* Constitution of the New York Stock Exchange, Inc., Art. VIII, 2 N.Y.S.E. Guide (CCH) ¶¶ 1351-1357; Arbitration rules 600-634 of the New York Stock Exchange, Inc., 2 N.Y.S.E. Guide (CCH) at ¶¶ 2600-2634. *See generally,* Uniform Code of Arbitration, N.A.S.D. Manual (CCH) ¶¶ 3712-3743. These rules have been expressly approved by the SEC, which has found them to be in the public interest and in furtherance of just and equitable principles of trade. *See* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979).

The SEC, moreover, retains jurisdiction to correct any perceived abuses or unfairness in the arbitration rules, pursuant to § 19 of the Exchange Act, 15 U.S.C. § 78s (1982). Furthermore, arbitrators are bound to follow the law in adjudicating § 10(b) claims. *Wilko,* 346 U.S. at 436 (1953). Manifest disregard of the law is one ground to vacate an arbitration award. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker,* 636 F. Supp. 444 (S.D.N.Y. 1986) (Weinfeld, J.) (manifest disregard of law under Rule 10b-4 required arbitrators' award to be vacated), *rev'd on other grounds,* No. 86-7513, slip op., (2d Cir. Dec. 23, 1986). *See also Swift Indus., Inc. v. Botany Indus., Inc.,* 466 F.2d 1125, 1130-31 (3d Cir. 1972); *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.,* 293 F.2d 796, 801 (9th Cir. 1961).

significant that, as the federal agency charged with ensuring that the securities laws are adequately enforced, the SEC supports the arbitration of securities disputes such as this one, involving § 10(b) and Rule 10b-5. *See* Brief for the Securities and Exchange Commission as *Amicus Curiae* Supporting Petitioners, *Shearson/American Express, Inc. v. McMahon,* No. 86-44 (1986). For practically identical reasons to those advanced by petitioners herein, the SEC has called for the Arbitration Act to be enforced. *Id.*

2. The Eighth Circuit's decision in *Phillips v. Merrill Lynch* and the First Circuit's decision in *Page v. Moseley* rest upon this Court's recent pronouncements questioning the applicability of *Wilko v. Swan* to § 10(b) claims and the explicit Congressional mandate favoring arbitration.

The Eighth and First Circuits recognized that this Court in recent years has consistently reaffirmed the strong national policy favoring arbitration. *Phillips,* 795 F.2d at 1395; *Page,* [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,001, at 94,912-913. As the *Phillips* court noted, this Court's decision in *Wilko* remains a carefully-limited decision, based upon the special characteristics of the statutorily-created cause of action under § 12(2) of the 1933 Act.

This Court has twice commented that *Wilko* does not control the question of the arbitrability of claims under § 10(b) of the Exchange Act. In *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974), this Court enforced an agreement to arbitrate disputes involving § 10(b) claims in an international context, stating:

> At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a

> suit brought under § 12(2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U.S. at 431. There is no statutory counterpart of § 12(2) in the Securities Exchange Act of 1934, and *neither § 10(b) of that Act nor Rule 10b-5 speaks of a private remedy to redress violations of the kind alleged here.* While federal case law has established that § 10(b) and Rule 10b-5 create an implied private cause of action, the Act itself does not establish the "special right" that the Court in *Wilko* found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of complaince with any "provision" of the respective Acts, certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act.

Scherk, 417 U.S. at 513-14 (citations and footnote omitted, emphasis added).

In *Byrd,* this Court noted the doubts expressed in *Scherk* about the applicability of *Wilko* to § 10(b) claims. It did not decide the issue, however, as the defendant had not sought to compel arbitration of the § 10(b) claim in the district court. *Byrd,* 470 U.S. 213, n.1.

Justice White, in his concurring opinion in *Byrd,* discussed the reasoning of *Wilko* and its inapplicability to claims under § 10(b) of the Exchange Act. He observed that the validity of the conclusion that § 10(b) claims are not arbitrable "is a matter of substantial doubt." *Id.* at 225. He stated that "*Wilko*'s reasoning cannot be mechanically transplanted to the 1934 Act," because a private agreement to arbitrate an implied cause of action cannot constitute a waiver of a "provision" of the Exchange Act where that Act makes no provision for a private right of action. *Id.* Given that a private right of action under § 10(b) has been judicially implied, rather than Congressionally

mandated, the nonwaiver provision of the Exchange Act, § 29(a), 15 U.S.C. § 78cc(a), "is thus literally inapplicable." *Id.* Moreover, the virtual identity of § 10(b) claims and claims sounding in common law fraud, which are clearly arbitrable, argues against any special exception to the Arbitration Act for § 10(b) claims. *Id.*

The Eighth Circuit analyzed this question in light of Justice White's concurring opinion in *Byrd* and this Court's recent reaffirmation of the strong national policy favoring arbitration. The *Phillips* court noted that, unlike common law claims for fraud or deceit, § 12(2) requires defendants to prove lack of due care. By contrast, § 10(b) requires plaintiffs to prove *scienter,* as in common law fraud. The Eighth Circuit also noted the significant differences in the jurisdictional provisions of the two statutes. *Phillips,* 795 F.2d at 1397-98.

After careful analysis, the Eighth Circuit concluded:

> Based on these differences between the 1933 and 1934 Acts, and on the strong federal policy favoring enforcement of arbitration agreements, we conclude that *Wilko*'s holding and rationale does not extend to claims arising under section 10(b) of the 1934 Act and Rule 10b-5. The nonwaiver provision of the 1934 Act, section 29(a), simply does not override the Arbitration Act in the same manner as section 14 of the 1933 Act when it is not buttressed by special rights and broad jurisdictional provisions similar to those found in the 1933 Act. ... We hold, then, that Congress has not evinced an intention to preclude the waiver of judicial remedies for the section 10(b) and Rule 10b-5 rights at issue here.

Id. at 1398. (footnotes omitted).

Another basis for the Fifth Circuit's prior decisions was its belief that "public policy" requires that § 10(b) claims be

heard in federal court. The Eighth Circuit, however, rejected that argument, noting:

> As support for its contention that 1934 Act claims are not arbitrable, Phillips argues that arbitration is less effective than adjudication in enforcing a plaintiff's rights under the 1934 Act. We believe that this argument, if it has any validity, is largely beside the point. Congress, through the Arbitration Act, as well as the Supreme Court have expressed increased approval for the use of arbitration rather than adjudication . . . The question here is whether Congress has created an exception to the mandate of the Arbitration Act for a plaintiff's judicially implied section 10(b) and Rule 10b-5 rights. We conclude that it has not.

Id. at 1398, n. 16.

The First Circuit has also analyzed the arbitrability of § 10(b) claims in light of Justice White's concurrence in *Byrd, supra. Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,001 (1st Cir. 1986). The First Circuit noted that the right to a judicial forum cannot be regarded as a nonwaivable "provision" of the Exchange Act subject to its anti-waiver clause, 15 U.S.C. § 78cc(a):

> [A]s five members of the [Supreme Court] observed in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 513-514 (1974), the 1934 Act, unlike the 1933 Act, does not *expressly* provide individuals a right to a judicial forum. Because of the absence of any express "provision" for a judicial forum under the 1934 Act, we conclude that the 1934 Act's anti-waiver clause, by itself, does not suffice to indicate a Congressional intent to preclude arbitration.

[Current] Fed. Sec. L. Rep. (CCH) ¶ 93,001, at 94,913 (footnotes omitted, emphasis in original).

The First Circuit went on to analyze the arbitrability *vel non* of § 10(b) claims under *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, __ U.S. __, 105 S.Ct. 3346 (1985). The First Circuit recognized three "maxims" arising from *Mitsubishi*. First, "the presence of a federal statutory right cannot, without more, prevent parties from agreeing to arbitrate." [Current] Fed. Sec. L. Rep. ¶ 93,001, at 94,914. Second, when determining whether federal rights are arbitrable, courts "are not to be influenced by concerns of the alleged inferiority of the arbitral forum in deciding the content of 'complex' federal statutory rights." *Id.* Third, courts should "not preclude parties from arbitrating disputes involving federal statutory rights unless [courts] find that Congress, either implicitly or explicitly, intended otherwise." *Id.* The First Circuit concluded that Congress had neither implicitly nor explicitly reserved commercial disputes under the Exchange Act for resolution by the courts, and held that § 10(b) claims were arbitrable. *Id.*

That holding, along with the Eighth Circuit's holding in *Phillips, supra,* is in direct conflict with the Fifth Circuit's holdings in this case and in *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986), *petition for cert. pending,* No. 86-282, in which the Fifth Circuit refused to acknowledge the lack of an expressly-created right to a judicial forum under the Exchange Act. The Fifth Circuit has adhered to its own pre-*Byrd* precedent in denying arbitration of § 10(b) claims. *Mayaja,* 803 F.2d at 162; *King,* 796 F.2d at 60. The conflict within the circuits is clear and direct. Only this Court can resolve the conflict.

3. The Fifth Circuit's decision conflicts with the clear intent of Congress and with this Court's recent decisions.

The Fifth Circuit's reliance on its prior decisions conflicts with the Congressional policy codified in the Arbitration

Act, in effect since 1925, and with recent decisions of this Court.

The Arbitration Act states in relevant part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof ... *shall be valid, irrevocable, and enforceable,* save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1982) (emphasis added). Congress intended the Arbitration Act to reverse the courts' general hostility towards arbitration agreements and to expressly state the strong public policy in favor of enforcing such agreements. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, __ U.S. __, 105 S.Ct. 3346, 3353-54 & n. 14 (1985); *Byrd*, 470 U.S. at 219-20 & n. 6; *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Scherk*, 417 U.S. at 510-11. This Court has recognized that the effect of § 2 of the Arbitration Act was to "create a body of federal substantive law of arbitrability," and that "the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration ..." *Moses H. Cone Memorial Hosp.*, 460 U.S. at 24-25; *see also Southland Corp.*, 465 U.S. at 10-16.

In *Mitsubishi*, this Court, citing Justice White's concurring opinion in the *Byrd* case, stated that courts must enforce the federal policy favoring arbitration manifested in the Arbitration Act, absent a clear Congressional intent to create an exception. *Mitsubishi*, 105 S.Ct. at 3355. Employing that standard, this Court held that an agreement to arbitrate disputes arising out of an international business

relationship was enforceable even as to antitrust claims under the Sherman Act, 15 U.S.C. § 1, *et seq.* (1982). *Id.* at 3361.

In *Mitsubishi,* this Court observed that, despite the importance of antitrust claims, there was no reason not to enforce an international agreement to arbitrate such claims:

> *By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute*; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that *if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.* Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Mitsubishi, 105 S.Ct. at 3355 (citation omitted, emphasis added). Even the dissent in *Mitsubishi,* which viewed special, statutorily-created rights as potentially exempt from the Arbitration Act, noted that § 10(b) claims that essentially parallel contract and fraud claims may be arbitrated. *Mitsubishi,* 105 S.Ct. at 3364 (citing *Scherk,* 417 U.S. 506).

Mitsubishi thus teaches that even express statutory claims are arbitrable absent explicit Congressional intent to the contrary. The Fifth Circuit, by refusing to enforce an agreement to arbitrate an implied right of action, gave greater weight to its own view of the importance of a judicial forum than it gave to the explicit Congressional mandate — codified in the Arbitration Act — to enforce arbitration agreements.

B. The Continued Conflict and Confusion Among the Lower Courts Over the Applicability of *Wilko v. Swan* to § 10(b) Claims Requires Early Resolution In Order to Avoid Increased Congestion in the Lower Courts.

As long as the arbitrability of § 10(b) claims remains unclear, the issue will be the subject of motions and appeals consuming inordinate amounts of judicial resources. In the brief period since *Byrd* was decided, over one hundred decisions have dealt with this issue. *See* Petition for Writ of Certiorari at 16, Appendix E, *Shearson/American Express, Inc. v. McMahon*, No. 86-44 (1986). More are being reported every week.

In addition to the motions currently pending in cases already filed, each week brings new filings of securities-related claims. Statistics compiled by the Administrative Office of the United States Courts reveal that during the twelve months ended March 31, 1986 a total of 3,064 "Securities, Commodities, and Exchanges" private civil actions were filed in federal district courts.[4] This flood of private securities lawsuits, many raising claims subject to arbitration agreements, will continue to force the district courts to decide the enforceability of such agreements and, perhaps, to decide claims that the parties had agreed should be arbitrated.

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[4] *See* Federal Judicial Workload Statistics, prepared by the Administrative Office of the United States Courts, Statistical Analysis and Reports Division, Washington, D.C., Table C-2 at 13 (March 1986). In the year ended June 30, 1985, 3,072 such cases were filed. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 283 (1985). This represents a 40% increase over comparable figures for 1982. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C-2 at 217 (1982).

The Arbitration Act reflects a strong congressional policy in favor of reducing congestion in our federal courts. Such congestion is one of the most serious problems facing the federal judiciary today.[5] When parties agree that a claim should be resolved out of court, only explicit Congressional intent should override that decision and require the expenditure of the time and resources required by a federal lawsuit. In this case, neither Congressional intent nor the language of the Exchange Act requires such a waste of time or judicial resources.[6]

Petitioners respectfully submit that this Court should grant certiorari and, to the extent the issue remains unresolved by *McMahon*, resolve the conflict among the circuits by reversing the Fifth Circuit's decision barring the enforcement of agreements to arbitrate § 10(b) claims.

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[5] Speech by former Chief Justice Warren E. Burger to the American Arbitration Association and the Minnesota Bar Association, on August 21, 1985, reported by UPI on the same date; Speech by former Chief Justice Warren E. Burger at New York University on November 18, 1982, reported in the Christian Science Monitor on November 24, 1982.

[6] A finding that § 10(b) claims are arbitrable will also eliminate another source of waste — the maintenance of duplicative proceedings in separate forums. As a result of this Court's decision in *Byrd*, federal courts are required to compel arbitration of state law claims. *See Byrd*, 470 U.S. at 217. If at the same time courts are required to hear federal claims based on the same facts, parallel — and most likely duplicative — proceedings will result. *See, e.g., Shotto v. Laub*, 632 F.Supp. 516, 523 & n.10, 529 (D. Md. 1986); *Steinberg v. The Illimois Company*, 635 F.Supp. 615 (N.D. Ill. 1986); *Austad v. Drexel Burnham Lambert, Inc.*, 638 F.Supp. 480 (N.D. Ill. 1986).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that (a) this Court issue a writ of certiorari in this case to review the decision of the United States Court of Appeals for the Fifth Circuit, (b) consideration of the Fifth Circuit Judgment be withheld pending the Court's decision in *Shearson v. McMahon*, and this case be remanded to the Fifth Circuit for the entry of Judgment in accordance with *McMahon*, and (c) to the extent the arbitrability of § 10(b) claims is not resolved in *McMahon*, that the Court resolve that issue in the present case.

DATED: January 13, 1987
NEW YORK, NEW YORK

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CERTIFICATE OF SERVICE

This will certify that a true and correct copy of the foregoing Petition For Writ of Certiorari has been sent, by certified mail, return receipt requested, to counsel of record for respondents, Mr. Charles R. Gorham, Shaddox, Compere, Gorham & Good, 1250 N.E. Loop 410, Suite 725, San Antonio, Texas 78209.

APPENDIX A

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, of an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77 l (2):

> Any person who —
>
> * * *
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said

section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Securities Exchange Act of 1934

Section 10, 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the

Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 29(a), 15 U.S.C. § 78 cc(a):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Securities and Exchange Commission Regulation

Rule 10b-5, 17 C.F.R. § 240.10b-5:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

APPENDIX B

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2762

MAYAJA, INC., S.A. ORART,
ELIAS SHEINBERG, and MARCIA SHEINBERG,

Plaintiffs-Appellees,

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE,
and SHEARSON LEHMAN BROTHERS, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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(October 24, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.

RANDALL, Circuit Judge:

I.

In July of 1985, plaintiffs Mayaja, Inc. (Mayaja), Orart S.A. Texas, Inc. (Orart), and Elias and Marcia Sheinberg brought suit against defendants based upon a series of transactions involving their financial management and commodity accounts with defendant Shearson Lehman Brothers, Inc. (Shearson). Both Mayaja and Orart are closely-held private corporations whose officers and directors are members of the Sheinbergs' family. Mayaja and Orart allege that defendant Bustamante, the manager of their discretionary commodity accounts with Shearson, conducted a number of

unauthorized transactions on the accounts with the complicity of his supervisor, defendant Bodkin, resulting in staggering losses. The Sheinbergs allege that Bustamante forged their signatures and withdrew money from their financial management account in order to meet margin calls on the commodity accounts of Mayaja and Orart. The plaintiffs assert against defendants claims of securities fraud under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission. Plaintiffs also assert civil RICO claims based upon predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, as well as upon the acts of securities fraud independently asserted.[1]

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[1]*See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1964(c), 1962 & 1961(l). Section 1964(c) provides treble damages for persons injured by RICO violations:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Section 1962, in turn, describes the activities that RICO prohibits:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> . . . .
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962. Finally, section 1961 defines the key phrases "racketeering activity" and "pattern of racketeering activity":

> As used in this chapter —

Defendants responded to the complaint with a motion to compel arbitration. Plaintiffs had agreed to arbitrate "any controversy arising out of or relating to [their] accounts, to transactions with [Shearson] . . . or to [their] agreeement[s] or the breach thereof" when they signed their respective agreements.[2] The defendants argued that the Supreme

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(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . or (D) any offense involving . . . fraud in the sale of securities . . . .

. . . .

. . . .

. . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

18 U.S.C. § 1961(1), (5).

[2]Paragraph 13 of the Customer's Agreement signed by Elias and Marcia Sheinberg reads in pertinent part:

Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with [Shearson] for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.

Supplemental Record on Appeal at 7.

The Commodity Account Agreements signed by Mayaja and Orart contained, as an addendum, a separately signed Arbitration Agreement that reads in part as follows:

Any controversy arising out of or relating to the Corporation's account, to transactions with [Shearson] for the Corporation or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the New York Stock Exchange, Inc. or of the American Arbitration Association Inc., as the Corporation may elect. . . .

While the Commodity Futures Trading Commission (CFTC) encourages the settlement of disputes by arbitration, it requires that your consent to such an agreement be voluntary. You need not sign this Arbitration Agreement to open an account with Shearson. (See 17 CFR 180.1-180.6)

Id. at 14, 19.

Court's decisions in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), and in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), implicitly overruled established precedent in this circuit holding that securities fraud claims under the 1934 Act are not arbitrable. *E.g., Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Defendants also asserted that these same Supreme Court decisions argue for the arbitrability of the RICO claims.

The district court found that the court's opinions specifically declined to address the question of the arbitrability of 1934 Act claims. Holding that Justice White's suggestion that 1934 Act claims may be arbitrable, contained in his concurring opinion in *Byrd*, was insufficient to overcome established precedent in this circuit, the court below denied the motion to compel arbitration.

On appeal of the order denying the motion to compel arbitration,[3] we affirm in part and reverse in part.

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[3] We note jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292 (a) (1). An appeal of an order denying a motion to compel arbitration falls within the purview of the decrepit *Enelow-Ettelson* rule, recently reiterated by this court as follows:

> "An order staying or refusing to stay proceedings in the District Court is appealable under § 1292 (a) (1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim."

Tenneco Resins, Inc. v. Davy Int'l, AG, 770 F.2d 416, 418 (5th Cir. 1985) (quoting *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962)) (emphasis in original); *see Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). It is clear that the securities fraud and RICO claims are legal causes of action. *See Cobb v. Lewis*, 488 F.2d 41, 46 (5th Cir. 1974) (claims for damages under securities fraud and antitrust laws are legal claims); *see also Byrd*, 105 S. Ct. 1238 (taking jurisdiction, without discussion, of appeal of order denying motion to compel arbitration in context of securities fraud claims). Since a stay pending arbitration is an equitable defense, *Tenneco Resins*, 770 F.2d at 419, the order appealed *sub judice* falls within the *Enelow-Ettelson* rule and is appealable.

II.

This appeal presents the question of whether, under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, plaintiffs' securities fraud and RICO claims must be submitted to arbitration. Like any decision whether to order arbitration under the Act, the inquiry in this case divides into two broad parts: first, did the parties agree to arbitrate the disputes in question, and, second, did Congress intend that the claims *sub judice* be arbitrable? *See Mitsubishi*, 105 S. Ct. at 3354, 3355. Accordingly, we first examine whether plaintiffs' arbitration agreements encompass the statutory claims asserted; in Part III we consider the arbitrability of these claims.

As a preliminary matter, we note that the contracts before us involve "commerce" within sections 1 and 2 of the Act sufficient to bring sections 3 and 4 of the Act into play. Agreements to transact in commodities futures without question involve interstate "commerce" as that term is defined in section 1,[4] and an agreement to transact in securities is no less interstate in nature. Having determined the applicability of the Arbitration Act to the instant proceeding, we now pause to consider whether "the issue involved in [this] suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3.

We find that the arbitration clauses before us encompass the claims asserted in this dispute. Both the 1934 Act claims and the RICO claims "aris[e] out of or relat[e] to" the plaintiffs' accounts or transactions with Shearson: the securities

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[4] "[C]ommerce . . . as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . .

Federal Arbitration Act, 9 U.S.C. § 1. Section 2 of the Act provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

fraud allegations and the other acts predicate to the RICO claim all derive from Shearson's handling of the plaintiffs' accounts or from transactions on those accounts made by Shearson's agents. Bearing in mind the federal policy that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), we find it clear that the parties agreed to arbitrate these claims. *Cf. Mitsubishi,* 105 S. Ct. at 3353 n.13 (construing more restrictive arbitration clause as encompassing arbitration of antitrust claims). We now turn to consider whether plaintiffs' 1934 Act and RICO claims are non-arbitrable even though they have agreed to arbitrate them.

III.

In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, *Moses H. Cone,* 460 U.S. at 24-25, it is necessary that the party opposing the motion to compel produce evidence that Congress intended the statutory claim to be non-arbitrable. *See Mitsubishi,* 105 S. Ct. at 3355. A mere absence of evidence that Congress intended the claims to be arbitrable is insufficient to overcome the presumption in favor of arbitrability; the party opposing the motion must show that Congress intended to make an exception to the Arbitration Act of the statutory claim in question. As the Supreme Court instructed in its *Mitsubishi* opinion:

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable . . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

Id.

Thus, the task of a court in determining the arbitrability of a claim under the Federal Arbitration Act is, first, to examine the relevant statutory text and legislative history for express evidence that Congress intended the statutory claim concerned to be non-arbitrable. In many cases Congress may not have explicitly addressed the arbitrability question. In this event, the court must carefully examine the *congressional* policies prompting the enactment of the cause of action to determine whether, in light of these policies, an implicit congressional intention that the claims under the statute not be subjected to arbitration may be inferred due to the inability of these policies to be furthered if the claims are subject to arbitration. *See Mitsubishi,* 105 S. Ct. at 3357-59 (examining, in the absence of an explicit statement of congressional intent as to arbitrability, congressional policies behind § 4 of the Clayton Act); *cf. McDonald v. City of West Branch,* 104 S. Ct. 1799, 1803-04 (1984) (basing finding of congressional intent that § 1983 claims be non-arbitrable upon conflict between arbitration and § 1983's objectives); *Barrentine v. Arkansas-Best Freight Sys.,* 450 U.S. 728, 740-45 (1981) (finding congressional intent that FLSA claims be non-arbitrable because of conflict between arbitration and FLSA's purposes); *Alexander v. Garner-Denver Co.,* 415 U.S. 36, 56 (1974) ("The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.").

With these rules of statutory interpretation in mind, we turn to the questions of whether Congress intended that 1934 Act and private RICO claims be litigated in factual settings similar to that of the case before us.

A.

This court has on many occasions addressed the question of the arbitrability of 1934 Act claims, and consistently held that Congress intended these claims to be non-arbitrable. *See, e.g., Bustamante v. Rotan Mosle, Inc.,* No. 86-2300, slip

op. 339, 340 (5th Cir. Oct. 17, 1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1275 n.1 (5th Cir. 1986); *Sawyer v. Raymond, James & Assocs., Inc.*, 642 F.2d 791, 792 (5th Cir. Unit B 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Basing their decisions upon an extension of the Supreme Court's analysis of the anti-waiver provision of the Securities Act of 1933 in *Wilko v. Swan*, 346 U.S. 427 (1953), these opinions found the similar anti-waiver provision of the 1934 Act to expressly preclude arbitration of the private cause of action that Congress implied in section 10(b) of the 1934 Act. *See, e.g., Sibley*, 543 F.2d at 543 n.3.

Defendants argue that the Supreme Court's decisions in *Mitsubishi* and in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), implicitly overrule our established precedent. As this court recently held in *Bustamante v. Rotan Mosle, Inc.*, neither of these Supreme Court opinions addressed the question of the arbitrability of 1934 Act claims. No. 86-2300, slip op. at 340-41 (5th Cir. Oct. 17, 1986). We agree with *Bustamante* and four other circuits that, absent a clearer statement from the Court as to the arbitrability of 1934 Act claims, we must abide by the confirmed precedent of our circuit. *Id.; accord Wolfe v. E.F. Hutton & Co., Inc.*, Nos. 85-3352, 85-5419 (11th Cir. Sept. 29, 1986) (en banc); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986); *Conover v. Dean Witter Reynolds, Inc.* 794 F.2d 520 (9th Cir. 1986) (finding, as a matter of first impression, 1934 Act claims to be non-arbitrable); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44). *Contra Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986). We therefore hold that the district court did not err in refusing to compel arbitration of the 1934 Act claims.

B.

The question of whether private RICO claims may be arbitrated is of first impression in this court. [5] Both the Second and Third Circuits have ruled on this question: the Second Circuit holding that private RICO claims may never be arbitrated, and the Third Circuit holding that such claims may be arbitrated when the offenses predicate to the required "pattern of racketeering activity" are arbitrable. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (86-44); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986). We hold that, at least in the context of claims like that *sub judice*, private RICO claims must be arbitrated under the Federal Arbitration Act.[6]

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[5] A panel of this court briefly addressed, in dicta, the question of the arbitrability of private RICO claims. *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-82 (5th Cir. 1986). On petition for rehearing and suggestion for rehearing en banc, the panel noted that its reasoning on the RICO issue was seriously called into question by *Mitsubishi*. *Id.* at 1282. The panel therefore amended its opinion "to refuse to decide the arbitrability *vel non* of the plaintiffs' RICO claim." *Id.*

[6] We recognize that our decision accords neither with *McMahon* nor with *Jacobson*, further adding to the split already present among the circuits. *McMahon*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *Jacobson*, 797 F.2d 1197 (3rd Cir. 1986) (2-1 decision). We respectfully cannot agree with the reasoning of either of these two opinions.

McMahon based its holding that RICO claims can never be arbitrated on "strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute." 788 F.2d at 99. The policy concerns mentioned by the court were developed by analogy to *American Safety Equip. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968), a Second Circuit opinion banning arbitration of antitrust claims. *American Safety* argued that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest." 391 F.2d at 826. *McMahon* held that the comparable concerns inherent in the enforcement of RICO claims precluded their arbitration. 788 F.2d at 98.

We decline to follow *McMahon* because, as the Third Circuit noted, "the *McMahon* court paid too little deference to the Supreme Court's

As the Third Circuit pointed out, RICO contains no anti-waiver provision similar to those of the 1933 and 1934 securities acts. *Jacobson*, 797 F.2d at 1202. In the instant case,

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decision in *Mitsubishi*." *Jacobson*, 797 F.2d at 1202. *McMahon* ignores *Mitsubishi*'s instruction that congressional intent governs the analysis of arbitrability of a statutory claim under the Arbitration Act. After *Mitsubishi*, "determining statutory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Id.* Since *McMahon* does not base its decision on a statutory interpretation of section 1964(c), we cannot follow its analysis. Moreover, we find *McMahon*'s reliance on *American Safety* misplaced. Although the Supreme Court did not explicitly overrule *American Safety* in the domestic context, *Mitsubishi* rejected so much of *American Safety*'s reasoning it is difficult to say what is left of the opinion to rely on. *See Mitsubishi*, 105 S. Ct. at 3357-60. Certainly the Court rejected that portion of *American Safety*'s reasoning relied upon by *McMahon*. *See id.* at 3359 ("Notwithstanding its important incidental policing function, . . . § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury.").

On the other hand, we must also respectfully decline to follow the reasoning of the Third Circuit. *Jacobson* defined the relevant field of statutory interpretation as consisting of (or at least including) the predicate statutes necessary for a section 1964(c) action: "Because of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi*, look to those statutues [sic] as well." *Jacobson*, 797 F.2d at 1202. In fact, *Jacobson* did not examine section 1964(c)'s text or legislative history, instead relying exclusively upon the text of predicate statutes. *See id.* at 1203. Following precedent holding 1934 Act claims to be non-arbitrable, *Jacobson* ruled that RICO claims based on predicate violations of the 1934 Act were not subject to arbitration. *Id.* Finding no indication of a congressional intent to make violations of the federal mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1342, non-arbitrable, however, *Jacobson* held that RICO claims founded upon these predicate statutes were arbitrable. 797 F.2d at 1203.

We find, however, that a claim under section 1964(c) is logically discrete from claims under its predicate statutes. As Judge Adams observes in his dissent from the majority opinion in *Jacobson*:

> A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

Jacobson, 797 F.2d at 1209 (Adams, J., dissenting). Judge Adams also notes that the difference between the RICO action and its predicate viola-

the congressional intent as to the arbitrability of private RICO claims cannot be ascertained from the text of the statute. We turn, then, to the legislative history for guidance.

Added to the House version of the bill after the original bill had been passed by the Senate, the private treble-damages provision later codified as section 1964(c) received relatively little discussion in either house of Congress. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3280 (1985).

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tions is demonstrated by the structure of the RICO statute. Unlike any individual predicate offense, RICO proscribes the operation of any "enterprise" engaged in or whose activities affect interstate or foreign commerce, using income derived from a "pattern of racketeering activity." *Id.* (citing 18 U.S.C. § 1962). "Pattern of racketeering activity" is defined as at least two violations of any predicate statute within a ten-year period. 18 U.S.C. § 1961(5). Section 1964(c) further adds the requirement that the plaintiff asserting a private RICO action have been injured by the "enterprise" as a result of such "racketeering activity." Thus, by its very structure, the RICO claim is distinct from its predicate offenses.

Judge Adams criticizes the majority opinion in *Jacobson* for splitting a single RICO count when that count is predicated upon arbitrable and non-arbitrable offenses:

> [T]he result reached by the majority would divide that [single RICO] count in order to allow for arbitration of the mail and wire fraud issues and litigation in a court of the securities issues — despite the fact that the unique RICO offense depends, in this case, on whether the enterprise has engaged in mail and wire fraud *as well as* securities fraud within a ten-year period.

Id. at 1210 (emphasis in original). The fallacy in *Jacobson*'s reasoning is further pointed out by its handling of the mail and wire fraud issues. The majority opinion held that RICO claims predicated upon mail or wire fraud statutes are arbitrable because "[n]o provision of the mail or wire fraud statutes bears any similarity to the anti-waiver provision of the 1933 and 1934 securities acts." *Id.* at 1203. No such anti-waiver provision can be found in the mail and wire fraud statutes because these are *criminal felony* statutes; arbitration of a felony charge simply does not occur in our legal system. A court searching for congressional intent as to arbitrability in criminal statutes will always return with empty hands. Private parties such as the plaintiffs in this case do not have standing to bring suit under these statutes. Only through RICO's section 1964(c) do they have standing to invoke these mail and wire fraud statutes at all, and it is, logically, to RICO that courts must look to determine the arbitrability of their claims.

The congressional discussion of the treble-damages provision did not touch upon the arbitrability of claims brought under the provision. *Accord Jacobson*, 797 F.2d at 1202. Since Congress has not expressly indicated its intent as to the arbitrability of these claims, we examine the congressional purposes underlying the enactment of section 1964(c) to determine whether, because of an inherent conflict between these purposes and the arbitration of the claims, Congress implicitly intended that all such claims be non-arbitrable.

Representative Steiger introduced the private treble-damages provision to the House Judiciary Committee as a primarily compensatory, and secondarily deterrent, measure:

> One possible amendment, for example, which I would raise for your consideration, would add a private civil damage remedy to title IX [the RICO subchapter of the Organized Crime Control Act], similar to the private damage remedy found in the anti-trust laws. Not every businessman, of course, will wish to take advantage of such a remedy, but those who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions.

Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) [hereinafter cited as *House Hearings*]. The American Bar Association independently proposed an amendment to RICO "authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." *Id.* at 544; *see also id.* at 559, 560 (identical proposal by ABA Section of Criminal Law).

While the bill was debated before the full House, several representatives referred to the private treble-damages provision. Representative Poff mentioned the provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. at 35,295 (1970); *see also id.* at 35,346 (Representative Poff noting that

the provision "has its counterpart almost in haec verba in the antitrust statutes"). Representative Steiger asserted that "[i]t is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress . . . . It represents the one opportunity for those of us who have been seriously affected by organized crime activity to recover." *Id.* at 35,346-47. Representative Mikva, referring to the treble-damages provision, proposed amending title IX of the bill to ensure that "we do not let some criminal law be abused by an overzealous competitor." *Id.* at 35,343. In proposing his amendment, which was rejected by the House, *id.*, Mr. Mikva noted the similarity of the treble-damages provision to the antitrust laws and implied that the purpose of the provision was compensatory. *Id.* at 35,342 (describing the private treble-damages provision as "sauce for the goose" injured by organized crime whereas his amendment provided "protection for the gander" that might be injured by frivolous suits brought by an aggressive competitor).

While the bill was pending in the House, Senator McClellan brought the attention of the Senate to the proposed treble-damages amendment. *Id.* at 25,190. Senator McClellan explained that the proposed amendment would "authorize private civil damage suits based upon the concept of section 4 of the Clayton Antitrust Act. This amendment, particularly, should prove, if accepted by the House, to be a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.* It is difficult to evaluate from his statement whether the senator regarded the treble-damages provision as a primarily compensatory or deterrent measure. While the word "extirpate," to root out, suggests a more deterrent connotation, the sentence's object, the "baneful influence of organized crime in our economic life," suggests that the wrong addressed by the provision is the economic damage caused by organized crime — a wrong more appropriately addressed by compensatory measures than by deterrent measures.

The House passed the bill with the treble-damages provision in the form proposed by the Committee. *Id.* at

35,363-64; *Sedima*, 105 S. Ct. at 3281. The Senate did not seek a conference, and adopted the bill as amended in the House. 116 Cong. Rec. at 36,296; *Sedima*, 105 S. Ct. at 3281.

The legislative history of section 1964(c) thus reveals three currents of congressional purpose. First, and perhaps foremost, is the congressional intention of compensating "the victims of organized crime." Second, the provision was intended to deter organized crime by "enhanc[ing] the effectiveness of title IX's prohibitions." Finally, one notes that the most recurrent theme in the legislative history of the section is found in the repeated references to section 4 of the Clayton Act. Since these references to the Clayton Act could be argued to be an adoption by reference of the purposes of the Clayton Act's treble-damages provision, we survey the goals of the Clayton Act for further clarification of the congressional intent behind section 1964(c).

The Supreme Court in *Mitsubishi* throughly examined the legislative intent behind section 4 of the Clayton Act for the purpose of determining the arbitrability of section 4 claims. 105 S. Ct. at 3358-60. While acknowledging that "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," *id.* at 3358, the Court held that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at 3359. Emphasizing the priority of the role of treble-damages as compensation over its role as enticement for private attorneys general, the Court noted that the antitrust cause of action remains at all times under the control of the individual litigant, and that the private antitrust plaintiff needs no executive or judicial approval before settling a treble-damages suit. *Id.* Because the deterrent function was secondary to the compensatory function, the Court concluded that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3359-60.

Mitsubishi's reading of the legislative purpose of section 4 of the Clayton Act, recurrently invoked during the congressional discussion of RICO's private treble-damages provision, accords with our analysis of the legislative history of section 1964(c). The primary purpose of the section is to compensate those injured by organized crime; the section's secondary purpose is to deter racketeers from inflicting such injuries. Paralleling *Mitsubishi*'s analysis, we find no evidence that Congress implied that all RICO claims be non-arbitrable. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will continue to be served.

The case *sub judice* presents yet another instance when, "[i]nstead of being used against mobsters and organized criminals, [section 1964(c)] has become a tool for everyday fraud cases brought against 'respected and legitimate 'enterprises.'" *Sedima*, 105 S. Ct. at 3287 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984)). The claims presented as a whole are the kind of claims for which the Commodity Futures Trading Commission has enacted extensive regulations governing arbitration. *See* 17 C.F.R. §§ 180.1-.5 (1986). In cases like that before us, the congressional purposes of compensation and deterrence underlying section 1964(c) — to the extent that any considerations of deterrence are present — may be fulfilled by arbitration of the plaintiffs' claims. We hold, therefore, that the plaintiffs' RICO claims must be submitted to arbitration under the Federal Arbitration Act.

IV.

The order of the district court denying defendants' motion to compel arbitration if AFFIRMED with respect to plaintiffs' 1934 Act claims; with respect to plaintiffs' private RICO claims the district court's order is REVERSED and REMANDED with instruction to compel arbitration in accordance with the Federal Arbitration Act and relevant agency regulations.

APPENDIX C

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

MAYAJA, INC., *et al*,

Plaintiffs

v.

JOSEPH F. BODKIN, *et al*,

Defendants

SA-85-CA-2051

O R D E R

On this day came on to be considered defendants' motion to dismiss and compel arbitration. The Court finds plaintiffs' allegations to be sufficiently specific to comply with Rule 9(b) F.R.Civ.P. Arbitration of the federal securities claim will be denied based upon the established law in the Fifth Circuit. *See, Smokey Greenhaw Cotton Co., Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983). Defendants argue that claims brought pursuant to the 1934 Act, are subject to arbitration since the Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd*, ____ U.S. ____ , 105 S.Ct. 1238 (1985). Among other authorities, a recent order from the Austin Division of this district is cited in support of defendants' position; this Court is of the contrary opinion. The Supreme Court in *Byrd*, 105 S.Ct. at 1240, n.1, specifically stated that the issue of the arbitrability of 1934 Act claims was not before it. The suggestion in the concurring opinion of Justice White that such claims are arbitrable is insufficient to overcome clearly established Fifth Circuit precedent.

It is therefore ORDERED that defendants' motion to dismiss and compel arbitration is DENIED.

SIGNED this 20th day of September, 1985.

/s/ H. F. GARCIA

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2762

D.C. Docket No. CA-85-SA-2051

MAYAJA, INC., S. A. ORART,
ELIAS SHEINBERG, and MARCIA SHEINBERG,
Plaintiffs-Appellees,

versus

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE,
and SHEARSON LEHMAN BROTHERS, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

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Before GEE, RANDALL and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is affirmed in part and reversed in part, and the cause is remanded to the District Court for futher proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bears its own costs on appeal.

October 24, 1986

ISSUED AS MANDATE: November 17, 1986